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No. 83-551

In the Supreme Court of the United States

OCTOBER TERM, 1983

HANSON BRATTON, ET AL., PETITIONERS

v.

CITY OF DETROIT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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INTEREST OF THE UNITED STATES

The Attorney General has primary responsibility for the enforcement of Title VII's prohibition against various forms of discrimination, including racial discrimination, in the area of public employment. 42 U.S.C. 2000e-5(f)(1), 2000h-2. This Court's resolution of the broad issue presented in this case, viz., the validity of a racial quota for promotions voluntarily adopted by a municipal police department in response to past hiring and promotion discrimination by the department, will have a significant effect on these responsibilities. The Court's resolution of the constitutional questions presented also could more generally affect the government's civil rights enforcement responsibilities. Indeed, the Attorney General previously certified this case to be of general public importance and moved unsuccessfully to intervene in the case, pursuant to Sections

706(f)(1) and 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(f)(1); 2000h-2, after the panel decision of the court of appeals.

STATEMENT

1. One of the responsibilities of the Detroit Board of Police Commissioners (Board) is to decide how and on what basis all promotions, including those from sergeant to lieutenant, are made (Pet. App. 149a). The City has long used a merit selection system for promotions; prior to 1974, all candidates for promotion were ranked on a single list according to numerical ratings based on various factors, including individual scores on a written examination (*id.* at 4a).[1] Promotions were made in rank order from the list of candidates. Pursuant to this system the percentage of black lieutenants in 1967 was 1.3% (two of 158). *Id.* at 105a. After the well-known riots in Detroit in 1967, the Department undertook a vigorous recruiting effort to increase the number of blacks throughout the Department. By 1974, the percentage of black lieutenants had risen to 4.8% (11 of 219). *Id.* at 123a-124a.

In 1974, the Board, after conducting two days of public hearings, adopted a race-conscious "affirmative action plan" for promotions in order to remedy the Department's prior discriminatory employment practices and to meet what the Board perceived to be an "operational need" for more black officers. The plan, as it related to promotions from the rank of sergeant to lieutenant, was as follows (Pet. App. 4a; footnote omitted):

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[1]The other criteria that contributed to a candidate's overall score were length of service, service ratings by superiors, college education, veterans' preference and an oral interview (Pet. App. 4a n.11).

The affirmative action plan does not alter the basic criteria for determining promotion eligibility, nor does it alter the minimum requirements necessary for consideration for the rank of lieutenant. The plan mandates that two separate lists for promotion be compiled, one for black and the other for white officers. The rankings on those lists are then made in accordance with the same numerical rating system previously employed. The promotions are made alternately from each list so that white and black officers are promoted in equal numbers. This 50/50 plan is to remain in effect until fifty percent of the lieutenant corps is black, an event estimated to occur in 1990.

2. In November 1975, petitioners, five white police sergeants who were passed over for promotions on the 1975 promotion eligibility list and the Detroit Lieutenants and Sergeants Association, the union for the officers, instituted the instant suit as a class action in state court against, inter alia, the City of Detroit, the Board, Mayor Coleman Young, and other municipal officials. The defendants removed the suit to the United States District Court for the Eastern District of Michigan. Petitioners' amended complaint alleged that the one-to-one racial quota for promotions to lieutenant violated Titles VI and VII of the 1964 Civil Rights Act (42 U.S.C. (& Supp. V) 2000d *et seq.* and 2000e *et seq.*), 42 U.S.C. (& Supp. V) 1981 and 1983, and the Fourteenth Amendment.[2]

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[2]Petitioners also alleged that the City violated the collective bargaining agreement with the Union, which incorporated the City's Charter provision requiring promotions to be made solely on the basis of competitive examinations, and therefore the plan violated Michigan law. Because the district court concluded that the affirmative action plan of the City was not only permissible under federal law but also was mandatory in light of its findings of past discrimination, it had no basis for considering petitioners' pendent state law claim. Although that part of the district court's judgment that pretermitted its consideration of the state law claims eventually was vacated by the court of appeals (see page 7, *infra*), that court did not resolve the state law part of the case.

After an extensive trial, the district court entered judgment for the City and its officials (Pet. App. 85a-254a). The court first found that the Department had been guilty of past hiring and promotion discrimination against blacks; there had been intentional discrimination between 1943 and 1967 and after 1967 the City's promotion system, primarily because of its continued use of a non-job related examination, had a disparate impact on blacks (Pet. App. 123a-137a). Against this background the district court considered petitioners' Title VII claim.[3]

Finding that the Board's one-to-one promotion quota satisfied all the requirements for a permissible affirmative action plan outlined by this Court in *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), the district court held that the promotion quota did not violate Title VII. Indeed, noting the City's use of unvalidated and discriminatory hiring and promotion tests until 1974, the district court held that "*Weber* aside, the affirmative action plan is justifiable to remedy clear violations of Title VII which continued into 1972 and 1973." Pet. App. 201a.

The district court also rejected petitioners' constitutional challenge. The court determined that the promotion quota was a "reasonable" effort to remedy the present effects of the City's past intentional employment discrimination, which did not cease until about 1967, when the minority recruitment program was instituted by the Department. Pet. App. 199a-216a.[4]

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[3]The court stated that petitioners' claim under Section 1981 was coextensive with their Title VII claim and their claims under Title VI and Section 1983 were coextensive with the constitutional challenge (Pet. App. 185a-186a). Petitioners have not challenged these conclusions.

[4]The district court also upheld the City's contention that "effective law enforcement required that the Police Department at all ranks roughly reflect the population which it serves" (*id.* at 218a) and thus

In a separate opinion, the district court incorporated the Board's affirmative action plan, including the promotion quota for lieutenants, into a final and mandatory judicial decree. Likening the voluntary plan to a consent decree, the court determined that the plan should be incorporated into a judicial decree (1) to insulate the plan from further attacks and (2) to ensure that the City maintained its affirmative action efforts, which the court held were constitutionally required. Pet. App. 242a-247a.

3. The court of appeals, with three separate opinions, affirmed (Pet. App 1a-45a). Noting that "what is valid under [the Fourteenth Amendment] will certainly pass muster under Title VII" (*id.* at 13a), the opinion of the court focused solely on the constitutionality of the Board's promotion quota. The court reasoned that its constitutional analysis was governed by the Sixth Circuit's earlier decision in *Detroit Police Officers Ass'n* v. *Young*, 608 F.2d 671 (1979), cert. denied, 452 U.S. 938 (1981), which upheld a one-to-one racial quota for promoting Detroit police patrolmen to the rank of sergeant (Pet. App. 10a & n.26). Adopting the standard of judicial review outlined in the opinion of Justices Brennan, White, Marshall, and Blackmun in *University of California Regents* v. *Bakke*, 438 U.S. 265, 336 (1978), the *Young* court and the court of appeals in this case determined that the substantial governmental interest in redressing the effects of past racial discrimination justifies race-conscious remedial measures so long as they are "reasonable." The reasonableness inquiry, according to

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concluded that the Department's "operational needs" justified imposition of the one-to-one promotion quota for lieutenants. In this regard, the court concluded that in light of the "history of antagonism between the Department and the black community, the affirmative action plan was a necessary response to what had been an ongoing city crisis" (*id.* at 229a).

the court, requires an examination into whether any discrete group or individual is stigmatized by the racial classification and whether the racial classification is "reasonable in light of [the program's remedial] objectives." *Id.* at 13a, 20a.

Applying this standard to the instant case, the court of appeals concluded that the evidence amply supported the Board's and the district court's findings of past intentional employment discrimination against blacks in the Detroit Police Department. Furthermore, the court determined that the Board's promotion quota for lieutenants did not unduly stigmatize anyone (*id.* at 20a-23a) and passed the "test of reasonableness" (*id.* at 23a).[5] The court of appeals further found that to the extent the one-to-one quota is excessive as a remedy for past discrimination in employment, it can be justified as redress "to the black population [of Detroit] as a whole" for a prior "pattern of unconstitutional deprivation of the rights of a specific, identifiable segment of the Detroit population by white members of the segregated police department." *Id.* at 31a. Finally, the court affirmed the district court's entry of the Board's affirmative action plan as a mandatory judicial decree.[6]

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[5]The court's determination that the promotion quota was "reasonable" was based on its subsidiary conclusions that (1) the quota was "substantially related" to the objective of remedying past discrimination, (2) there were practical limitations on the effective use of other means to remedy past discrimination, (3) the quota was to terminate when its remedial objectives were fulfilled, and (4) the quota did not "unnecessarily trammel" the interests of white candidates for promotion to lieutenant since 50% of the promotions still went to whites (*id.* at 24a). The court expressly found it "unnecessary to address the validity of the operational needs defense to affirmative action in this context" (*id.* at 12a n.30).

[6]Judge Celebrezze concurred in the result only, finding the case governed by the constitutional analysis enunciated in *Young* (Pet. App. 42a). Judge Merritt concurred in the court's application of its constitutional analysis, but dissented from, among other things, affirmance of

4. On April 29, 1983, the United States sought leave to intervene as a party appellant and to file a petition for rehearing in which the United States argued, inter alia, that the Board's adoption of a one-to-one promotion quota violated the equal protection guaranty of the Fourteenth Amendment and that the incorporation of the Board's quota into a court order was inconsistent with the court's authority under Section 706(g) of Title VII, 42 U.S.C. 2000e-5(g). The motion to intervene was denied, with Judge Merritt dissenting. Pet. App. 47a-50a. The court also denied petitioner's petition for rehearing, but, in so doing, the court vacated that part of the district court's final order incorporating the quota into a judicial decree. The court also remanded the case to the district court for further consideration of the 50% quota in light of 1980 census data showing that Detroit now has a 63% black population. *Id.* at 77a-78a.[7]

DISCUSSION

The sensitiveness of the issues presented in this case is readily apparent. The City of Detroit has unilaterally modified an otherwise apparently reasonable merit promotion system that had been bargained for collectively and has declared that fully half of all individuals promoted should be selected not solely on the basis of their measured ability but rather pursuant to an explicit racial criterion. We do not believe that this action can be sustained under the relevant statutes; nor do we believe that the City's decision here can be squared with the Constitution—notwithstanding the fact that the City's action was expressly made as a response to

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the district court's incorporation of the Board's affirmative action plan into a judicial decree. *Id.* at 43a-45a.

[7]Judge Wellford dissented from the denial of rehearing en banc, because the panel "inappropriately considered the racial breakdown of the Detroit population as a whole instead of the racial breakdown of the applicable qualified labor pool" (Pet. App. 79a).

undeniable past discrimination against blacks that had created a police force that was largely unresponsive to the concerns of a substantial portion of the City's population.

The courts below in grappling with this case labored under a serious handicap; this Court has heretofore, in its first three "reverse discrimination" decisions, not agreed on broad principles to guide the lower courts in resolving such cases. Moreover, none of the prior cases before this Court presented a setting comparable to this one and thus the specific reasoning and decisions in those cases did little to assist the courts below in reaching their results. For example, unlike the situation in *University of California Regents* v. *Bakke*, 438 U.S. 265 (1978), the plan here was adopted to remedy actual discrimination by the institution involved; but, unlike the "Harvard plan" discussed by Justice Powell in *Bakke*, the plan here gave an absolute preference based on race, instead of using race solely as one factor in choosing which candidates to promote (compare 438 U.S. at 307-310, 315-319). Similarly, unlike *United Steelworkers* v. *Weber*, 443 U.S. 193 (1979), this case involves a public rather than a private employer and the plan it adopted allegedly contravenes a collectively bargained for merit promotion system. Finally, unlike *Fullilove* v. *Klutznick*, 448 U.S. 448 (1980), this case concerns a quota with a potential life span exceeding ten years that was adopted in the context of public employment and by a municipality rather than by Congress.[8] Whether all or some of these

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[8]Nor is it likely that the Court's decision in *Stotts* v. *Memphis Fire Department*, No. 82-229, will make clear precisely how this case should be decided. *Stotts* involves a district court's remedial authority under Title VII and a consent decree to prohibit a City from conducting layoffs and demotions according to seniority and to order that layoffs be conducted by race in order to guarantee that the percentage of blacks hired and promoted under an affirmative action plan will not be reduced. While a decision by the Court on the merits in *Stotts* may well provide some illumination of the issues presented here, the cases are sufficiently dissimilar that review here would seem warranted whatever the outcome of *Stotts*.

factors should affect the proper disposition of this case is a matter that should be resolved by this Court. Moreover, this case comes before this Court after a full trial and final judgment, and with no justiciability issues that might cloud its final disposition. Compare *Boston Firefighters Union, Local 718* v. *Boston Chapter, NAACP*, No. 82-185 (May 16, 1983); *Minnick* v. *California Dep't of Corrections*, 452 U.S. 105 (1981); *DeFunis* v. *Odegaard*, 416 U.S. 312 (1974). In sum, this case presents an appropriate occasion for the Court to attempt to reach some consensus on the proper approach to cases involving the adoption by the government of quotas for employment. There is an obvious public interest and importance in providing guidance for governmental entities which, like Detroit, may have engaged in past discrimination, but would prefer to avoid litigation by adopting voluntarily their own remedial plan.

As is evident from our participation in the court of appeals, the United States is of the view that the judgment below was erroneous. We are concerned about the adoption of race-conscious, non-victim-specific remedies, particularly by any institution other than Congress. We have profound doubts whether the Constitution permits governments to adopt remedies involving racial quotas to benefit persons who are not themselves the victims of discrimination—at least in the absence of a clear statement by Congress itself, acting pursuant to its broad remedial authority under the Thirteenth and Fourteenth Amendments, requiring the use of such remedies. See *Fullilove* v. *Klutznick, supra*; *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437-444 (1968); *Katzenbach* v. *Morgan*, 384 U.S. 641, 656-658 (1966); cf. *Kent* v. *Dulles*, 357 U.S. 116, 130 (1958). We also have serious doubts about the validity of the unilateral adoption of a quota in place of a merit system in apparent disregard of the approval Congress expressed for merit systems in Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h);

and we are troubled by the City's intention to retain its quota until the percentage of black lieutenants equals the percentage of blacks in Detroit, even though that may be an artificial goal that needlessly disadvantages innocent non-black persons and could take two decades to achieve. Should the Court grant the petition, the United States would attempt to address these issues fully, in light of prior decisions and government practice and available indicia of congressional intent. In our view, this case provides an excellent vehicle for addressing important and recurring issues that so far have evaded clear resolution by this Court and the lower courts, and there is a pressing public need for whatever clarification can be achieved. Accordingly, we respectfully submit that the petition for a writ of certiorari should be granted.

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